FILED
FEB 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

v.

CLAIBORNE HARDWARE COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Where a state court finds the "agreed use" of "force, violence and threats" in a boycott whose primary purpose is to persuade merchants to use their influence toward changing local government policies, and where the court also finds that "the volition of many . . . persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse from the complainants," does the state court violate the Constitution by awarding compensatory damages to the injured merchants against those boycott organizers found to have participated or acquiesced in the force, violence and threats?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This was not a peaceful and voluntary boycott.

The courts below found that physical force and violence, in which all of the petitioners participated or acquiesced, was central to the success of the boycott. This illegal force was conducted against black people in Claiborne County who did not agree with the boycott and would not otherwise have observed it. Much of the violence was committed by members of a paramilitary organization known as the "Deacons" or the "Black Hats," who wore uniforms, carried weapons, drilled in close formation, and served as "store watchers." The store watchers sometimes stopped black people from entering stores, and at other times took their names. The names were read at weekly mass meetings. Many of those who were denounced at the meetings were subsequently the victims

of violence, including beatings, shooting into houses, and the destruction of automobiles and other property.

The state courts found that Charles Evers, the paid full-time Field Secretary of the National NAACP who was the national organization's principal spokesman and organizer in Mississippi, was the prime mover in the boycott and in the illegal coercive tactics. Evers personally threatened boycott breakers with violence, including death, on a number of occasions. He designated the "Black Hats" as his "enforcers." Evers continued to threaten people with violent retribution even after a number of boycott breakers had already been the victims of violence. He was not joking or engaging in harmless hyberbole. The black people of Port Gibson believed him. Evers often stated his belief that "each race has a right to its own discipline." He regarded recalcitrant blacks as his "children" whom it was his right to discipline:

> See, people don't always obey because they want to. They usually obey because they have to.

Mississippi Action for Progress, which managed the federal Head Start program in Claiborne Couty and whose goals and outlooks are quite similar to those most often expressed by the national NAACP, stated in its brief in the state court that

> violence to those who broke the boycott continued to be a way of life in Port Gibson and Claiborne County.

Petitioners simply do not accept the facts as found by the state courts. Their arguments about First Amendment protection of "peaceful, voluntary" boycotts are irrelevant to this case. Many of their legal arguments therefore amount to pleas for a trial de novo in the United States Supreme Court. Many of these arguments invite the Court to fashion a different law for these petitioners than for others who employ similar tactics with similar results. Such an outcome could be effected by the employment of a "level of scrutiny" that denies the state

court resolutions of disputed fact questions the respect they are due and imposes an insuperable burden of proof on those who have been injured by the petitioners' constitutionally unprotected activities.

The record reflects that the Port Gibson boycott was a nasty business. The state court decision was just. The invocation of the term "civil rights boycott" does not change the facts, and it should not be allowed to change the law.

ARGUMENT

I. THE PETITIONERS' CASE RESTS ENTIRELY ON THEIR CONTENTION THAT THE TRIAL JUDGE MADE INCORRECT FINDINGS OF FACT.

Petitioners' brief on the merits urges this Court to accord broad First Amendment protection to "peaceful activities to support and enforce civil rights boycotts." In section IV, *infra*, we question the constitutional basis for a distinction between "civil rights boycotts" and other boycotts, and suggest that the broad view of First Amendment protection urged by petitioners conflicts with this Court's holdings that there is no absolute constitutional protection for peaceful and voluntary secondary boycotts aimed at securing better wages and working conditions. The principal dispute between petitioners and respondents, however, is not on the law but on the facts.

The petitioners' assertion that "the Claiborne County boycott was a peaceful and voluntary boycott" which happened unfortunately to coincide with certain "sporadic incidents of violence" that "appear to be nothing more than random entries in the Claiborne County police blotter" could not be further from the facts found by the trial judge:

> The "store watchers" or "enforcers" on occasion physically stopped and blocked black customers and instructed them not to trade with white merchants. Some blacks were physically assaulted for continuing to trade with white merchants after being warned. Personal property purchased in white-owned stores by blacks was taken from them and destroyed. On at

> least two occasions gunshots were fired into the houses of black people who continued to trade with white-owned business establishments. . . . The thread of fear and violence is woven throughout this case.
>
> Chancery Court Opinion at 19b, 34b.[1]

Charles Evers, who served as Field Secretary of the NAACP, was the principal organizer of the Port Gibson boycott. The very candid account of the boycott in his autobiography, *Evers*, is more consistent with the record and the findings of the courts below than with the statement of facts in petitioners' brief:

> Nothing wrong with disciplining your own family. I'm not saying we beat anybody up. We took care of them in a way they understood. People would catch them coming out of an uncooperative store and take their bags away from them, destroy the bags, while they were paying to keep us in slavery, or a motor might lock on a car. There might be a bit of sugar in the gas tank. There occasionally may be somebody—I didn't do it—but somebody would send a brickbat through a window around midnight with a telegram saying, 'You shopped at such and such a place.' See, people don't always obey because they want to. They usually obey because they have to.

Evers 8-9 (World Publishing Co. 1971) (quoted at App. 201).[2]

We believe that unless this Court substitutes the petitioners' findings of fact for those of the trial court, it will not reach the questions of constitutional law that would be presented by an award of damages to merchants injured by the sort of boycott described in the petitioners' brief. We therefore devote a major part of our argugument, sections II and III *infra*, to discussing the proper standard of review and the support in the record for the trial court's conclusion that this was *not* a "peaceful and

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[1] Citations to the opinions of the courts below are to the Appendices to the Petition for Certiorari.

[2] Wherever possible, citations to the record are to the appropriate pages in the Joint Appendix ("App.").

voluntary" boycott. The remainder of this section deals with the question presented on the facts found by the courts below:

> Where a state court finds that physical violence, explicit verbal threats of violence, and threatening conduct including the presence of armed guards outside the doors of business establishments contribute substantially to the success of a boycott, is it unconstitutional for a state court to award compensatory damages to the merchants against those boycott organizers who participated in, authorized or ratified these threats and violence?

This question answers itself even more readily than the questions of law that the petitioners believe to be presented in this case, and it is a far more accurate restatement of the actual holdings in the courts below.

a) Violence, threats of violence, and threatening conduct are not constitutionally protected forms of expression.

Anything, including killing, can be a form of expression. Threatening to break someone's neck if he betrays a cause is both "political expression" and "pure speech," but it is not protected by the First Amendment. That some of the framers of the Constitution were willing to countenance threats and even violence against those who traded with their British enemies in the months immediately preceding the American Revolution cannot be taken as evidence of an intention not to punish similar conduct after the establishment of an American republic, much less to prohibit the state governments from doing so as a matter of constitutional law.

This Court has long recognized that the First Amendment does not protect all expression or even all speech. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken or printed." Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 502 (1949) (per Black, J.). A threat

to inflict physical violence is perhaps the most obvious example of speech that will not ordinarily be protected. Justice Holmes's statement that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" was coupled with the observation that this same "stringent protection" gave nobody the right to "utte[r] words that may have all the effect of force." Schenck v. United States, 249 U.S. 47, 52 (1919). Thus a criminal statute punishing threats on the life of the President of the United States is "[c]ertainly . . . constitutional on its face." Watts v. United States, 394 U.S. 705, 707 (1969). In Federal Communications Commission v. Pacifica Corporation, 438 U.S. 726 (1978), the Court cited the above-quoted passage from *Schenck* as illustrative of a distinction between offensive opinions and offensive modes of expression:

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government remain neutral in the marketplace of ideas. . . . But . . . [t]hese words offend for the same reason that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572. . . .
>
> *Id.* at 745-46 (per Stevens, J.) (footnote omitted).

Pacifica involved obscene language and *Chaplinsky* involved "fighting words," whose only link to violence is that they might incite the hearer to attack the speaker. Threats of violence, like these other offensive modes of

speech, might be used to express opinions, including political opinions, and are therefore not always outside the scope of the First Amendment. But a threat to break somebody's neck or shoot into his house if he refuses to join a political movement, even if it expresses the speaker's opinion of the value of the movement and perhaps also of the person threatened, does more: It constitutes an attempt to obtain the listener's compliance whether or not he is persuaded of the merits of the argument. Affording constitutional protection to threats would chill and circumscribe the victim's exercise of his own freedom of expression and association; as Mr. Evers put it, he will obey not because he wants to but because he has to. Far more clearly than in the cases of obscenity and "fighting words," society's decision to punish those who threaten violence is a decision that enhances freedom.

Society's right to punish threatening conduct is at least as clearly established as its right to punish verbal threats. Significantly, many of this Court's decisions recognizing this right have had to do with picketing. In Hughes v. Superior Court of California, 339 U.S. 460 (1950), Justice Frankfurter observed that

> while picketing is a mode of communication it is inseparably something more and different. . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication . . . . It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.
>
> *Id.* at 464-6.

Justice Douglas, concurring in Bakery & Pastry D&H Local v. Wohl, 315 U.S. 769 (1942), observed that "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the

ideas being disseminated." *Id.* at 775-76. In Cox v. Louisiana, 379 U.S. 559 (1965), the Court held that picketing "is subject to regulation even though intertwined with expression and association." *Id.* at 563. Citing *Schenck*, *Chaplinsky*, *Hughes* and *Giboney* among other cases, Justice Brennan distinguished between picketing and "such a pure form of expression as newspaper comment or a telegram by a citizen to a public official." 379 U.S. at 564. And in National Labor Relations Board v. Retail Store Employees Union, 447 U.S. 607 (1980), the Court rejected a First Amendment challenge to a statutory prohibition of *peaceful* picketing incident to a secondary boycott. Justice Stevens, concurring, noted that

> picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. . . . Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than picketing is that the former depend entirely on the persuasive force of the idea. The statutory ban in this case affects only that aspect of the union's effort to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.

Id. at 619 (Stevens, J., concurring).

This Court has recognized that where picketing had been part of a course of conduct in which violence has also played an important role, the picketing itself may operate as a threat of further violence. In Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1942), Justice Frankfurter observed that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." *Id.* at 293.

Our case does not rest on the vitality of the holding in *Meadowmoor*. Like most of the cases in which this Court has had occasion to distinguish picketing inter-

twined with violence from pure expression of opinion, *Meadowmoor* involved a prior restraint of peaceful picketing. In section V, *infra*, we argue that the injunction issued but never enforced in this case is not an issue before this Court. In any case, a state court judgment granting compensatory damages in a civil case for actual economic losses does not pose the same threat to First Amendment values as a prior restraint or as a criminal conviction, and the question of civil liability in this case should be judged accordingly. Finally, none of the defendants was held liable solely because he participated in peaceful picketing activities, so the Court need not consider the extent to which such activities alone might constitute actionable conduct. The peaceful picketing cases have been discussed merely to illustrate the gap between the First Amendment as it is construed by the petitioners and as it has been construed by this Court.

In this case the stores were guarded by "enforcers," in some instances with guns. *See* App. 52-54, 129-30, 133-34, 150, 289. The trial court found as a fact that the store-watching activity in this case was intended not primarily to express an opinion but to overcome the volition of potenial customers, and that it had its desired effect. Chancery Court Opinion at 17b-18b, 39b. The guns and uniforms, the physical blocking of black people on their way into white stores, the taking of the names of boycott violators and subsequent publication of these names in newspapers and public meetings, and the frequent threats of physical violence that characterized the store-watching were more than sufficient evidence to support the trial court's finding, particularly since all concerned knew of the shootings and beatings and other disciplinary acts that had been imposed on boycott breakers. Even on particular days when store-watchers did not engage in violence or in verbal threats, their conduct had, in Justice Frankfurter's words, "los[t] its significance as an appeal to reason and become part of an in-

strument of force." 312 U.S. at 293. This conduct was not protected by the First Amendment.

Since the petitioners' brief is premised on a different view of the facts, it is hard to know to what extent they would take issue with our view of the law. On page 30 of petitioners' brief, however, there is the suggestion that incidents in which "no act of physical violence is described" are among incidents that "lack any significance." And on page 32 the petitioners suggest that Charles Evers's statement that "if we catch you going in any of them racist stores we're gonna break your damn neck" constitutes "highly charged political rhetoric about emotional political issues" that "does not lose its First Amendment protection." For this proposition the petitioners cite *Watts v. United States, supra.* We disagree. The Court in *Watts* found that there was no threat because no reasonable person would have felt threatened. Had the President known of the threat, he would have agreed with the Court that the statement "could [not] have been interpreted otherwise" than as "a kind of very crude offensive method of stating a political opposition to the President." 394 U.S. at 708. Indeed, the threat was "expressly made conditional upon an event—induction into the armed forces—which petitioner vowed would never occur." *Id.* at 707.

The *Watts* case, concerning a conditional threat to perform a highly improbable action, is analogous to Tuberville v. Savage, 86 Eng. Rep. 684 (1669), wherein the defendant was held not to be liable for assault for a statement that "if it were not assize time, I would not take such language from you." Prosser sharply distinguishes such cases, involving a condition contrary to fact, from threats like those made by Evers and other defendants during the course of the boycott:

> [T]he defendant is not free to compel the plaintiff to buy his safety by compliance with a condition which there is no legal right to impose. 'Your money

> or your life,' whether or not it does anything to allay the anxiety of the plaintiff, is an obvious invasion of his rights, and will not prevent an actionable assault.
>
> Prosser on Torts 40 (4th ed. 1971) (footnotes omitted).

Either the petitioners are urging this Court to work a constitutional revolution not only on the common law of civil conspiracy but also on the common law of assault and of extortion, or they simply disagree with the trial court finding that when "physical harm" was "promised" by Evers "on at least two occasions," it was "apparent that the black people believed him." Chancery Court Opinion at 37b-38b. The court further found that Evers had designated as his "enforcers" a paramilitary organization that was "a cause of pervasive fear among black citizens of Claiborne County" and that "the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse from the complainants." *Id.* at 17b-18b, 39b. By the time of the 1969 speech, Evers, other boycott leaders and members of the Black Hats had warned black citizens many times that they had "better not" patronize the merchants, that they would be "taken care of" if they did, that it was "no use to go calling the sheriff, he can't help you, he can't sleep with you at night." Boycott breakers had been injured in their persons and their property on many more than the three occasions acknowledged by petitioners.

To those black citizens of Claiborne County who chose not to regard themselves as Charles Evers's "children" subject to his "discipline," the threats of physical violence were not a joke and they were not harmless political hyperbole. It was not assize time in Port Gibson. The threats were not protected speech.

b) If the trial court was correct in finding that the boycott was violent and coercive rather than peaceful and voluntary, the Mississippi courts were not constitutionally prohibited from assessing civil damages against those boycott organizers who condoned or acquiesced in the violence and coercion.

The trial court found that "certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers." Chancery Court Opinion at 39b. One defendant was found only to have participated in a peaceful march, and the complaint against him was dismissed. *Id.* at 28b. The Mississippi Supreme Court reversed the judgment against 39 other defendants on the ground that there was insufficient evidence in the record to prove their participation in the conspiracy. Mississippi Supreme Court Opinion at 26a. The Supreme Court clearly indicated its reason for upholding the trial court judgment against the other defendants: whether the boycott was "primary, secondary, economical, political, social or other," civil liability could be sustained because of "[*t*]*he agreed use of illegal force, violence and threats.*" *Id.* at 23a (emphasis added).

Whatever constitutional problems might be raised by the broadest possible application of the common law of civil conspiracy to an agreement to work in concert to achieve political goals, those problems are not presented on the facts as found by the trial court. A civil conspiracy is an agreement to pursue illegal ends or to pursue legal ends by illegal means, and the Mississippi Supreme Court found that this conspiracy was of the latter kind. *Id.* at 23a. But this is not a case in which parties to an otherwise legal agreement are held liable for illegal conduct of which they did not know or which they did their best to stop. The award of damages was based solely on the *agreed* use of illegal force, violence and threats. *Id.* at 23a. The evidence in the record to

support the findings of the courts below is discussed in section III, *infra*.

Amici American Civil Liberties Union and National Organization for Women urge the Court to use this case as a vehicle for unconstitutionalizing the common law of civil conspiracy on the ground that the Restatement of Torts provides a more enlightened rule. Brief Amici Curiae of the American Civil Liberties Union and the National Organization for Women at 22. It is worth noting that under the rule suggested by these amici, Restatement of Torts 2d, Section 876, a defendant may be held liable for harm caused by another person if he "gives substantial assistance or encouragement to the other" to conduct himself in a manner the defendant knows to be tortious. Even under this standard the Court should uphold the judgment against the petitioners, provided only that the lower courts were correct in their findings of fact and that the word "substantial" is not a code word for the imposition of a Draconian burden of proof on those who have been injured by tortious conduct. Most conspiracies consist of some participants who do the dirty work and others who give the orders. The leaders seldom publicize their endorsement of the illegal conduct—Charles Evers's speeches and autobiography are rare exceptions to this rule, and even under the ACLU standard he should be held liable for having "substantially encouraged" the violent acts of others, as well as for the effects of his own threats of violence—and it is usually necessary for the trial judge to infer endorsement of illegal activity from conduct and context.

We discuss in section II, *infra*, the appropriate standard of Supreme Court review of the trial court's conclusions in this case. We urge this Court to recognize, as the ACLU does not seem to recognize, that those who are injured by politically motivated violence and threats also have interests that are often of constitutional stature and that are always legitimate objects of state protection. In this case the interests of the victims happen to be the very interests—freedom of expression, of

association, and of choice in pursuing economic and political goals—that are asserted by those who were found to have injured them. *See, e.g.*, App. 332-33, 401-02. In allowing the trial court to draw the most likely conclusions from the preponderance of the evidence, society has struck an even balance between alleged victims and alleged tortfeasors. In a civil case involving threats and violence, the First Amendment no more requires a restriking of that balance one way than the other.

The petitioners raise a closely related issue when they claim that as a matter of constitutional law "an individual associating with others to advance personal beliefs and ideas is not responsible for another's illegal acts absent a highly particularized showing of responsibility." The cases cited for this proposition are inapposite: Noto v. United States, 367 U.S. 290 (1961) was a reversal of a federal criminal conviction based on construction of the Smith Act. Elfbrandt v. Russell, 384 U.S. 11 (1966), held overbroad a state loyalty oath statute imposing criminal penalties for subsequent affiliation with an organization having as one of its purposes the overthrow of the government of Arizona. The plaintiff did not have "any chance to get a hearing at which its precise scope and meaning could be determined," *id.* at 13, and the Court feared that teachers would not know whether they could join international scientific organizations and seminar groups. Healy v. James, 408 U.S. 169 (1972) held that where a group of students had "proclaim[ed] their complete independence" from the national SDS, the student group could not be banned from a state college campus solely because of the national organization's philosophy. United States v. Spock, 416 F.2d 165 (1st Cir. 1969) was a federal criminal case. None of these cases suggests that a state court violates the Constitution by awarding damages in a civil case for losses that actually occurred as a result of conduct not protected by the First Amendment on a finding of general intent to further the illegal conduct rather than specific criminal intent.

In Ramsey v. United Mine Workers, 401 U.S. 302 (1971), this Court reversed lower court holdings that a "clear proof" standard was required as a basis for imposing statutory treble damages against a labor union found to have engaged in an "implied conspiracy" manifested by peaceful picketing and other organizational and strike activity. The Court stated that the courts below had erred in applying this "new and different standard of proof" rather than the traditional preponderance of the evidence test "in deciding factual issues concerning the commission vel non of acts by union officers or by members alleged to constitute a conspiracy, or the inferences to be drawn from such acts, or concerning overt acts in furtherance of the conspiracy, the impact on the relevant market or the injury to plaintiffs' businesses." *Id.* at 309 (per White, J.).

Although *Ramsey* was a case of statutory construction, the Court could not have applied an unconstitutional standard of proof. The facts and the legal issues in this case resemble *Ramsey* much more closely than any of the "subversive philosophies" cases cited by petitioners. This Court has not seen fit to constitutionalize the burden of proof in cases punishing modes of expression and association that violate the federal labor laws. Nor should it unconstitutionalize the traditional rules of evidence and procedure in analogous cases in the state courts.

The Port Gibson boycott was not a national movement some of whose goals and actions may have been unknown to some of its members. The injuries it caused were not hypothetical future ones. Everybody knew that "violence to those who broke the boycott continued to be a way of life." Brief of Mississippi Action for Progress in Mississippi Supreme Court at 21. Yet the Black Hats stayed on the streets taking the names of boycott breakers to be denounced at mass meetings, and boycott participants still applauded when Charles Evers promised to "take care of" and to "discipline" uncooperative blacks. App. 91-92. The courts below dismissed forty of the original defendants because there was insufficient evidence that

they had "agreed" to the force, violence and threats. We discuss in section III, *infra*, the evidence supporting the state courts' finding that the remaining defendants did so agree. In inferring the agreement of some of the petitioners from their conduct, and in requiring only general intent as a basis for civil liability, the courts below did not violate the First Amendment.

Petitioners also attack the measure of damages announced by the Mississippi Supreme Court in its instructions to the trial court on remand, citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966), for the proposition that, as a matter of constitutional law, "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing." *Id.* at 729. *Gibbs*, however, involved construction of the same section of the Norris-LaGuardia Act that was presented in *Ramsey, supra.* The Court in *Gibbs* purported to speak only of federal preemption and not of the requirements of the First Amendment, and the Court's later decision in *Ramsey* surely dispels any notion that the First Amendment requires in all cases the "new and different" limitations on recovery that the labor laws impose in a few cases.

Yet another distinction can be made between this case and *Gibbs*. In that case there were two distinct episodes, the first violent and illegal, the second peaceful and protected by the labor laws. Indeed, the record reflected that union officials had suppressed the violence immediately upon learning of it. 383 U.S. at 740. In Mead v. Retail Clerks International Association, 523 F.2d 1371 (9th Cir. 1975), the court pointed out that *Gibbs* applied only to a situation "where a union has engaged in both lawful and unlawful conduct, and the consequences of those actions are seperable." 523 F.2d at 1378. In cases where the consequences of legal and illegal conduct are not separable, "[t]he requirement that the unlawful objective must have 'materially contributed' to the loss or have been a 'substantial factor' in bringing it about, will prevent windfall recoveries . . . ." *Id.* at 1379. And the Court in *Gibbs* distinguished

Meadowmoor, supra, on the ground that where picketing was set in a background of violence, the record "might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." 383 U.S. at 731-32.

The liability imposed in this case was for conduct that is not protected by the First Amendment. Contrary to the assertions in petitioners' brief at pages 39-41, the trial court and the Mississippi Supreme Court found violence and threats to have been a substantial and material factor in the success of the boycott and the consequent injuries to the plaintiffs. Chancery Court Opinion at 18b-19b, 35b, 39b; Mississippi Supreme Court Opinion at 20a, 24a. A state court is not constitutionally required to limit the penalties it imposes for unprotected conduct to the actual amount of the damage thereby occasioned. In *Ramsey*, for instance, this Court imposed a statutory penalty of three times the actual amount of damages occasioned by the peaceful but unprotected expression and association in which the defendants had engaged. Moreover, in this case there was only one boycott, and it was substantially and materially violent and coercive. Even if the state courts would have been under an obligation to apportion severable items of damages attributable to protected and unprotected conduct respectively, they were under no obligation to indulge in hypotheticals contrary to fact. The petitioners chose to use coercion as well as persuasion to inflict the desired economic damage on the merchants, and they cannot be heard to complain that they might have succeeded almost as well if they had eschewed coercion.

c) The NAACP is directly liable for the acts of its Field Secretary.

Petitioners and amici devote major portions of their briefs to attacking the constitutionality of the common law of conspiracy, on the apparent assumption that most petitioners, and especially the NAACP, cannot be held liable except on a conspiracy theory. It is a curious assumption.

Even if this Court were to hold that the First Amendment shields all petitioners who did not personally commit any of the threatening or violent acts that were found to have injured the respondents, the judgment of the courts below against the NAACP should be affirmed. The case against the NAACP does not rest on the law of conspiracy but on the most basic principles of the law of corporations and of agency.

Charles Evers was the principal organizer of the boycott, and he personally threatened those who broke the boycott with physical violence on a number of occasions spanning at least three years. His designation of the paramilitary Black Hats as "my enforcers," his frequent promises to "take care of," to "discipline" and to "chastise" boycott breakers, his warnings not to call the police because "they ain't going to sleep with you" at night, and his two threats to "break the necks" of those who patronized the white merchants, comprise a course of action that is consistent with the philosophy of "racial discipline" revealed in his autobiography. Violence against whites was counterproductive, but blacks were his "children" whom it was his right to discipline. "See, people don't always obey because they want to. They usually obey because they have to." App. 201.

For a fuller account of Evers's illegal and constitutionally unprotected activities in connection with the boycott, see section III, *infra*, at 34-36.

To the exact extent that Evers was liable for the effects of his threats and threatening conduct and for the violent acts of his "enforcers," the NAACP is liable. This liability is "vicarious" only in the sense that all corporate liability is vicarious: a corporation can act *only* through its agents, and Charles Evers was unquestionably the principal agent of the NAACP in the State of Mississippi during the period of the boycott. From 1963 to 1969 he served as full-time paid Field Secretary for the national organization, one of ten such employees in the nation. He was the principal spokesman for the national NAACP in Mississippi. The

boycott was within the scope of his authority, and even though the individual members and directors of the national organization might not have approved of his conduct, a corporation is responsible for the wrongful acts of its agent when they are directly related to the performance of his duties. Corporations are deemed to have "authorized" even criminal acts performed by their agents when the acts relate directly to the performance of the agents' duties. New York Central & Hudson River RR v. United States, 212 U.S. 481 (1909); Lake Shore & M.S.R. Co. v. Prentice, 147 U.S. 101 (1892); Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111 (5th Cir. 1980). When an employee is performing tasks that are of the same general class as those he is authorized to perform for his employer, the wrongful way in which he performs those tasks will not of itself take him out of the course and scope of his employment; indeed, when the wrongful act is within this general class not even his employer's specific admonition against the wrongful act will relieve the employer of liability. Pierson v. United States, 527 F.2d 459 (9th Cir. 1975); Williams v. United States, 352 F.2d 477 (5th Cir. 1965).

We urge this court to reject any suggestion that the principles of respondeat superior do not apply in this case because the NAACP is not a "commercial" organization. These rules did not evolve in order to punish greedy capitalists, but in order to redress injuries in cases where the corporate agent cannot personally compensate the injured parties for the damage he did in his wrongful pursuit of corporate goals. In this case the NAACP hired Evers as its organizer and spokesman in Mississippi. He used its name, its prestige and its resources in his illegal and constitutionally unprotected course of conduct, and his NAACP credentials were a factor in his success in getting others to join him. It is not unfair, much less unconstitutional, for the state courts to hold the NAACP responsible for investigating Evers's character and background and for exercising appropriate control over him thereafter.

Although it is not necessary that the directors of a corporation have actual knowledge of their agent's wrongdoing in order to be held responsible for its effects, there is evidence in this case that officers of the national NAACP did know and disapprove of Evers's conduct of the boycott. He testified that National NAACP officials had expressed displeasure with his activity in a prior boycott, that they had threatened to fire him but had backed off when he called their bluff. App. 213. During the Port Gibson boycott he was summoned to a meeting in Birmingham "and they were really going to fire me then," but "I carried two busloads of Mississippians over there to Birmingham, and we just stood pat and we told them in no uncertain terms, 'If you fire him, take the whole NAACP out of Mississippi.' And they didn't do it then. They backed off then." App. 214. The Director of Branches and Field Administration of the National NAACP confirmed that Evers's relationship with the national office "was always one of interest and uniqueness. . . . He didn't dot 'I's', and cross 'T's'. . . . But he got a job done." App. 456-57.

The National NAACP's structure for conducting its operations in Mississippi during the boycott period would make it particularly unjust for this Court to grant a special exception to the rules of respondeat superior. The raising and spending of money was primarily a function of the national organization, which sent money to the state organization and the local branches as it was needed. App. 443-46. The national organization paid Evers's salary as well as the general expenses of operations in Mississippi. App. 444, 468. The national NAACP retained an attorney in Mississippi who decided for himself what legal assistance to provide in connection with NAACP activities in the state. App. 448. While the national organization's official position was that its chapters should not engage in illegal activities, the Mississippi state organization, local branches and Evers himself continued to receive financial support from the national organization even when they were in contravention of official policies. App. 440-43, 451-55. Local branches were discouraged

from purchasing or holding property in their own names. App. 449. This structure provided component parts of the national organization the necessary funds to conduct their operations while allowing them to remain judgment-proof.

This Court has refused to overturn a state court finding that the NAACP was liable for the acts of its agents in a case where the facts were far weaker than in this case. In NAACP v. Overstreet, 384 U.S. 118 (1966), the Court dismissed as improvidently granted a writ of certiorari to review a state court judgment against the NAACP for damages to compensate a merchant who had been the object of a boycott wherein the sidewalk had been blocked and the merchant's customers threatened. The evidence of violence was not nearly so great as in this case, and the agent of the NAACP who organized the boycott was a local branch official rather than one of the ten paid national NAACP Field Secretaries. 384 U.S. 118 (1966) (Douglas, J., dissenting from dismissal).

Although the liability of the NAACP does not depend solely on the acts of Charles Evers, his consistent pattern of threats and threatening conduct during the course of the boycott was among the most prominent and best documented examples of boycott activity that was not protected by the First Amendment. This activity was directly related to his duties as Field Secretary, and the NAACP is accordingly liable with or without the law of conspiracy.

II. THIS COURT SHOULD RESPECT THE STATE COURTS' FINDINGS OF FACT UNLESS THERE IS NO EVIDENCE TO SUPPORT THEM.

All of the arguments in the petitioners' brief are premised upon a set of facts that is at marked variance with the facts found by the trial court and by the Mississippi Supreme Court.[3] Moreover, many of the petitioners' argu-

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[3] *See, e.g.*, Brief for Petitioners at 27 ("[T]he record does not support any finding that fear of any type of conduct by other boycott participants was important to the boycott's success."), 28

ments on questions of law amount to different ways of suggesting that this case requires a standard of review so exacting as to effect a trial *de novo* in the United States Supreme Court, in which the petitioners' version of the facts would be accorded at least the same dignity as the findings of the courts below. See section I(b), *supra*, at 11-17.

Review of the evidence and substitution of the Court's own conclusions on matters of fact for those of the courts below is not one of the purposes of certiorari jurisdiction. United States v. Johnston, 268 U.S. 220 (1925). Even where questions of constitutional law turn on the resolution of disputes concerning the facts, this Court will defer to trial court findings unless there is no evidence in the record to support these findings. Lyons v. Oklahoma, 322 U.S. 596 (1944); Gallegos v. Nebraska, 342 U.S. 55 (1951). When a case comes to this Court from a state supreme court deference is supported not only by concern for judicial efficiency and recognition of the trial court's advantages in the evaluation of testimony, but also by "due regard to federal-state relations." Culombe v. Connecticut, 367 U.S. 568, 605 (1961) (opinion of Frankfurter, J.).

This litigation presents a particularly strong case for deference to trial court findings. There is a 16,000 page

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("[T]he record establishes with remarkable clarity the general *absence* of fear in the community."), 32 n.34 (suggesting that Charles Evers threatened only once that the necks of boycott breakers would be broken), 33 (twelve "random entries in the Claiborne County police blotter . . . constitute the sole 'thread' by which the chancellor and the Mississippi Supreme Court tied allegedly unlawful activity to the Claiborne County boycott), 34-35 (some petitioners did nothing but march or disseminate leaflets), 36 ("there was no evidence that Petitioner NAACP ever organized, sponsored, or condoned violence or threats of violence"), 41 ("It is undisputed" that the boycott "consisted primarily of constitutionally protected" activities.). *But see* Chancery Court Opinion at 17b-18b, 19b, 20b, 34b-38b, 39b, 51b-52b; Mississippi Supreme Court Opinion at 14a-21a, 23a, 24a, 26a; section III, *infra*, at 29-41.

record. There were over 100 witnesses, whose credibility must supply the answers to many hotly disputed questions of fact. There are matters—such as what some of the petitioners meant when they said they would break people's necks, burn their houses, "whip" them, "discipline" them and otherwise "take care of" them, and whether their listeners were afraid—in which nuance and context are crucial, and on which reading the printed record cannot begin to supply the advantages of observing live witnesses.

Many of the fact findings with which the petitioners take issue are conclusions not about raw evidentiary facts but about the ultimate facts at issue in this litigation. This does not detract from their character as findings of fact. Although it is entirely appropriate that this Court conduct its own examination of the record to determine whether there is evidence to support these findings, they should be upheld unless there is no evidence from which a rational trier of fact might have derived them. "Great weight . . . is to be accorded to the inferences which are drawn by the state courts. In a dubious case . . . the state court's determination should control." *Culombe, supra*, at 605. The Supreme Court should substitute its own inferences for those of the state courts only when review of the "uncontested external happenings" indicates "unmistakably" that the state court has wrongly characterized the evidentiary facts. *Id.*

Many of this Court's decisions on the proper measure of respect for trial court conclusions arose in the context of confessions alleged to be involuntary. A finding of voluntariness, like many of the findings with which petitioners here take issue, is necessarily "conclusory." Moreover, the determination of the ultimate fact will frequently dispose of the question of constitutional law to which it is material—to be precise, the question whether the state has violated the defendant's Fifth Amendment right against self-incrimination, which is quite as high on any ladder of constitutional priorities

as the rights asserted by petitioners here.[4] Where a defendant contests a state court finding of voluntariness, therefore, the Supreme Court must look behind the conclusion to the record. But in so doing the Court will assume the resolution of every incidental factual dispute in favor of the ultimate conclusion reached by the trial court, *even where the trial court opinion does not explicitly resolve each such intermediate question*:

> [A]ll testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one caveat, necessarily, that we are not to be bound by findings wholly lacking support in evidence. . . . Where there are no explicit findings, or in the case of lacunae among the findings, the rejection of a federal constitutional claim by state criminal courts applying proper constitutional standards resolves all conflicts in testimony bearing on that claim against the criminal defendant. In such instances we consider only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted.
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> Culombe v. Connecticut, 367 U.S. 568, 603-04 (1961) (opinion of Frankfurter, J.) (footnote omitted).

Petitioners seek to bring this case within a narrow exception to the rule of the Supreme Court deference to state court findings of fact. In Time, Inc. v. Firestone, 424 U.S. 448 (1974), the Court stated that such deference "is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious

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[4] These cases were decided prior to Miranda v. Arizona, 384 U.S. 436 (1966). They are logically still applicable in cases where "voluntariness in fact" is at issue despite technical compliance with the forms prescribed in *Miranda*. *Lyons* was cited by the Court in Time, Inc. v. Firestone, 424 U.S. 448, 464 (1974) as defining the general standard for Supreme Court review of state findings of fact.

determination of the existence or nonexistence of the critical fact." *Id.* at 463. In that case the trial judge had not submitted the question of the defendant's fault to the jury, since under Florida law the tort of libel did not require a finding of fault. This Court held that the defendant's constitutional rights would have been violated by a libel judgment without a finding of fault, and the Court could not tell whether one of the courts below had made such a finding. The Court refused to regard the words "journalistic negligence" in the Florida Supreme Court opinion as indicative of a finding of fault, since the opinion generally proceeded on the assumption that no such finding was necessary, and the two-word phrase in question might have been simply an epithet expressing the Florida court's general displeasure with the defendant's conduct rather than a "conscious determination" of fault in accordance with a constitutionally acceptable standard. *Id.* at 461-64. The case was remanded for a determination by the state courts of the fault question.

This case falls within the general rule of Supreme Court deference to state court fact findings, and not within the exception announced in *Firestone*. Conceding *arguendo* that the trial court erred in assuming that it could award damages to merchants injured by a nonviolent secondary boycott, the trial court opinion nevertheless clearly indicates a "conscious determination" that threats, violence and pervasive fear played an important role in the success of the boycott. Moreover, the Mississippi Supreme Court based its opinion *entirely* on the "agreed use of illegal force, violence, and threats," never reaching the question whether a nonviolent and voluntary boycott could be penalized without violating the First Amendment. This explicit finding of fact cures the constitutional deficiency, if any, in the trial court opinion. As the Court said in *Firestone*:

> Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made

> by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated.
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> *Id.* at 461 (per Rehnquist, J.).

Petitioners attack the opinions of the courts below in several ways that openly or subliminally suggest that this Court simply disregard the state courts' findings and inferences. For instance, the trial court concluded that "some defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers." Chancery Court Opinion at 39b. The petitioners point out that this finding is "conclusory," as findings tend to be; they then suggest that the next sentence in the trial court opinion, which alludes to boycott tactics other than violence, was intended to serve as a list of "examples" of such violence. The reader is left with the impression that there must have been no violence at all. See Brief for Petitioners at 12.

Petitioners also make much of a sentence in the Supreme Court opinion stating that force, violence and threats were "present" during the boycott, implying that this sentence lends support to their own contention that the violence was sporadic and perhaps even coincidental. But this sentence was in a paraphrase of a Fifth Circuit opinion; elsewhere the Supreme Court finds that threats and violence were pervasive and that the petitioners had agreed to use these tactics. *See, e.g.*, Mississippi Supreme Court Opinion at 14a-19a, 20a, 23a, 24a.

The petitioners state that the "plain fact" is that the boycott succeeded because of voluntary and constitutionally protected activity and that the trial court was wrong in its finding that "pervasive fear" was instrumental in preventing trade with the white merchants. Brief for Petitioners at 33; *see* Chancery Court Opinion at 20b,

37b-38b. They advance two arguments in support of this "plain fact": First, when the trial judge listed a number of incidents that "strikingly revealed" the "atmosphere of fear and violence that prevailed among blacks," he listed only about a dozen such incidents. Second, some witnesses (mostly the petitioners themselves) testified that they were not afraid. These, however, are not appropriate arguments for Supreme Court rejection of state court conclusions. "The fact that there was evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony." *Lyons*, *supra*, at 603. And the list which petitioners treat as exclusive was in fact only one of a number of references in the Chancery Court opinion to the violence, the threats of violence, and the consequent pervasive fear of violence in Port Gibson. Nowhere did the trial judge suggest that he based his conclusions solely on this list, and he was not bound to do so.

In addition to claiming that the state court findings are too conclusory to merit respect, the petitioners complain that these findings are not conclusory enough. The petitioners' brief asserts frequently that the state courts "did not resolve" certain questions: no violent act was found to have been done by the petitioners except for the destruction of a flower garden; no damage was found to have been caused as a result of threats and violence; the NAACP was not found to have approved of any physical violence. These statements are half-truths only insofar as they refer to the state courts' failure to use certain words and phrases. The courts below found, for instance, that "the NAACP designated a group of young black males as 'enforcers,'" that NAACP Field Secretary Evers announced at an NAACP meeting that boycott breakers would be "watched" and that "any 'uncle toms' who broke the boycott would 'have their necks broken by their own people," that people were in fact "physically assaulted for continuing to trade

with white merchants after being warned," that physical harm to boycott breakers "was promised by the Field Secretary of the National NAACP, Charles Evers, on at least two occasions, and it is apparent that black people believed him. This NAACP-sponsored boycott was a definite success insofar as economic damage to the white merchants was concerned . . . ." Chancery Court Opinion at 17b-19b, 37b-38b. The Mississippi Supreme Court adopted these findings as its own and added an explicit finding that the defendants (with the exception of the 39 against whom the court dismissed the lower court judgment after an "adequate search of the record") had engaged in "[t]he agreed use of illegal force, violence and threats." Mississippi Supreme Court Opinion at 15a, 23a, 26a.

The petitioners' charge that the courts below "did not resolve" conflicts in the testimony is coupled with innuendoes about the courts' application of the law of evidence. The "competence" of some evidence is questioned, and petitioners complain that as party witnesses they were "subjected to leading, repetitive, browbeating and almost completely unchecked examination." Brief for Petitioners at 27. This facet of the petitioners' attack on the record is perhaps their very weakest argument. Adverse party witnesses *are* subject to "leading" and "almost completely unchecked examination". Much of the testimony in this case was testimony about what witnesses had heard rather than about what they saw, because whether people *believed* harm would come to boycott breakers was a material and disputed fact. Other evidence was admitted within the various exceptions to the hearsay rule. The record reflects that the trial judge sustained many of the petitioners' objections; some hearsay evidence was admitted without objection; the petitioners did not argue any evidence questions on appeal, nor assign these questions in their petition to this Court for certiorari. Petitioners do not in any case argue that these questions have constitutional significance.

The forms of action are dead. The state courts did not violate the Constitution by failing to couch their ultimate conclusions in words that anticipate and precisely negate each of the majestic generalities of the petitioners' brief. Nor did they violate the Constitution by failing to state with regard to each evidentiary fact, "We find that witness X lied when he said Y on page 12,352."

A fair reading of the opinions of the courts below indicates that these courts resolved the essential issues adversely to the petitioners. They found that violence, threats of violence and the consequent pervasive fear contributed materially to the success of the boycott; that the Field Secretary of the NAACP promised at the outset that physical harm would befall boycott breakers; that after such violence had happened to a number of boycott breakers, Evers and other boycott leaders promised more of the same; and that all of the present petitioners manifested their support for these tactics. We believe that the only question before this Court is whether there is evidence in the record—not in the petitioners' brief, and not in the parts of the lower court opinions which petitioners would substitute for the record as the only permissible source of evidentiary facts—on which the lower courts might reasonably have based their conclusions.

III. THE RECORD STRONGLY SUPPORTS THE FINDINGS OF THE COURTS BELOW THAT VIOLENCE, THREATS AND PERVASIVE FEAR WERE CENTRAL AND EFFECTIVE ENFORCEMENT DEVICES

The facts of this case according to petitioners involve "only twelve acts of 'enforcement' even arguably connected to the boycott." Brief for Petitioners at 28. Petitioners would have this Court believe that even these twelve acts were probably not connected to the boycott at all, or that they "lack any significance" because "no act of physical violence is described." Petitioners even

characterize these acts, which include shooting into houses in the middle of the night and the beating of an old man, as having had " 'victims' " rather than victims. *Id.* at 33.

a) The "Twelve Sporadic Incidents" acknowledged by Petitioners.

Petitioners do not suggest how many acts of violence it takes before a movement loses its nonviolent character and its victims their quotation marks. The list to which they refer—actually describing at least fifteen separate events—was only illustrative of the trial judge's conclusion that an "atmosphere of fear . . . prevailed among blacks" during the Port Gibson boycott. Chancery Court Opinion at 35b. An examination of the list and of petitioners' reasons for regarding it as trivial, however, is instructive:

1) *The Gilmore shooting.* James Gilmore testified that he was sitting at home late one evening with his wife and baby when they heard the squealing of a car's brakes outside. When he went to the window, men in the car fired shotgun blasts into the house. He and his wife "hit the floor" and stayed there until they heard the car drive off. Gilmore got into his car and chased the other car, eventually forcing it off the road. Gilmore identified three of the petitioners, all leaders of the Black Hats, among the six men in the car. App. 326-32. The trial judge points out that the three petitioners were convicted and that the state supreme court reversed and remanded because of a deficiency in the grand jury. Petitioners' brief therefore treats the incident as unrelated to the boycott, although the trial judge observes that Gilmore had broken the boycott. Gilmore testified at the trial of this civil case, naming the petitioners as the guilty parties; the trial judge obviously regarded the shooting as boycott-related.

2) *The Cullens shooting.* Petitioners say that the trial judge "implied, but did not find" that the shots were fired because Laura Cullens was not observing the boycott. Laura Cullens testified that she had received threat-

ening phone calls saying "that I was uncle tom and I was going to the stores and violating the NAACP law." App. 392. Her name had been called out at NAACP meetings where she had been "vilified and abused" as a boycott breaker. Chancery Court Opinion at 35b. There was no testimony suggesting any other possible reason for the shooting. The trial judge spent a paragraph detailing Cullens' problems with the NAACP before referring to the shooting. As the Mississippi Supreme Court said, quoting Justice Frankfurter:

> Judges need not be so innocent of the actualities of . . . conflict as to find in the Constitution, state or federal, a denial of the right of Mississippi to conclude that the use of force was not the conduct of a few irresponsible outsiders.
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> Mississippi Supreme Court Opinion at 20a, quoting *Meadowmoor, supra*, at 295.

This is a civil proceeding. The evidence, albeit circumstantial, was overwhelming that the shooting was in retribution for Laura Cullens' breaking of the boycott, and the trial judge obviously so concluded. His failure to identify "any individual Petitioner . . . as having committed" the act, Petitioners' Brief at 30, is irrelevant.

3) *The destruction of Murriel Cullens's Car.* Cullens testified to numerous threats of physical violence that he had received concerning his failure to observe the boycott. App. 397-99. There was no other suggested motive. This is not enough for the petitioners, who say that "there is no evidence to support any inference that this vandalism was related to the boycott."

4, 5) *The threats against Johnny and Susie Cox and the shots fired at them.* The shooting happened about a week after Mr. and Mrs. Cox had asked a policeman to escort them into the boycotted cleaners. Johnny Cox testified that one of the petitioners had threatened him at the time of the incident at the cleaners. App. 308-09. Cox identified two of the petitioners, including the storewatcher who threatened him, as the men who fired the shots that narrowly missed him and his wife. Petition-

ers discuss the laundry incident at length and find that the Coxes had nothing to worry about, then dismiss the shooting with the observation that the trial court did not "find who fired" the shots. Brief for Petitioners at 31.

6) *The destruction of Mrs. Butler's flower garden.* Although one of the petitioners, a Black Hat, testified that he committed this act in retribution for an elderly woman's violation of the boycott, the petitioners discount it because the trial court did not find that it caused any particular person to be afraid. Petitioners' Brief at 29, 33. The frequent and somewhat lighthearted references to this incident in petitioners' brief suggest that petitioners may regard the destruction of flower gardens as a form of expression protected by the First Amendment.

7) *The beating of Preacher White.* The petitioners say there is no "competent evidence" of this event or of its connection to the boycott. The trial court's application of the law of evidence is not one of the issues presented for review by this Court. Preacher White was deceased at the time of the trial. Chief Porter testified that White had come to him asking for help. White told Porter that he had been stripped and beaten for violating the boycott. App. 120-23. White also complained of threats of further retribution. *Id.* Many other witnesses, including some petitioners, testified that they had heard White had been beaten because he broke the boycott. *See, e.g.*, App. 163-64, 284, 303.

8) *The taking of Eddie Lewis's bottle of whiskey.* Alfred Lee Davis was a Black Hat who was serving as a store-watcher and accosted Lewis on the street as he left the boycotted liquor store, cursed him for dealing with whites and took the liquor he had just purchased. App. 325-26. The petitioners dismiss this incident because Davis was "never a defendant in this case," but many boycott organizers including many of the Black Hats were not sued because they could not be found. This was obviously an instance of boycott enforcement, and the trial judge treated it as such, characterizing

Davis as "an NAACP member and activist in the black boycott" as well as a member of the Black Hats. Chancery Court Opinion at 20b, 37b.

9, 10) *The Willie Myles incidents.* The trial court noted that Willie Myles received threats ("Somebody called my wife and told her they were going to burn my house down, and that she wouldn't have no job at school. . . . Because we didn't participate in the civil rights. . . . In the boycott . . . ," App. 335-36) after his name was called out at NAACP meetings as a boycott breaker. Later he was warned that some men planned to whip him because he had bought gasoline from a boycotted station, and he was followed by some men who forced him off the road. They fled when they saw that he had a gun. App. 336-41. The petitioners find that these men must not have been enforcing the boycott because Myles thought that they lived in an adjoining county. Brief for Petitioners at 34. This is a non sequitur. Myles thought that the men were from Fayette, a few miles from Port Gibson. App. 336. Charles Evers lived in Fayette and had plenty to do with the Port Gibson boycott.

11) *The slashing of Jasper Coleman's tires.* Jasper Coleman had been warned by members of the Black Hats not to trade with white merchants, but he ignored their warnings. Chancery Court Opinion at 37b. His tires were slashed in the middle of the night, and he later heard that it was because he had broken the boycott (App. 351), but petitioners insist that the incident cannot be used as evidence because the individual perpetrator was not identified.

12, 13) *The beating of Emerson Davis and the threats on his life.* The trial court apparently believed Davis's version of the incident in which he was beaten for breaking the boycott, but the petitioners believe Rudy Shields, the leader of the Black Hats whom the trial judge said was "the principal figure in several altercations." Chancery Court Opinion at 35b. The trial judge notes that

Davis was characterized as an "Uncle Tom" and that petitioner James Bailey threatened to kill him. Chancery Court Opinion at 37b. Petitioners infer from this juxtaposition that the trial court is seeking to penalize protected speech, but we suggest that the trial court's "uncle Tom" reference was to James Bailey's motive for wanting to kill Davis. Davis himself testified that Bailey picked a fight with him because "[h]e was a civil rights worker, and he wanted to get up a rowl." App. 375.

14, 15) The trial court found that "on at least two occasions" Charles Evers had "promised" physical harm to boycott breakers, and that "it is apparent that the black people believed him." Petitioners say that there was only one time, that it was after many of the instances of violence had already occurred, and that in any case it was protected speech. The trial court found that on April 1, 1966, in the NAACP meeting announcing the beginning of the boycott, Evers had promised that if black people break the boycott "your necks will be broken by your own people." Chancery Court Opinion at 17b-18b. Petitioners say Evers did not say this *in 1966* because only Sheriff McKay testified to it; but at that very point in the opinion the trial judge notes the sheriff's exceptional fairness and credibility as a witness, so it is evident that petitioners are quarreling with an express finding of fact for which there is reasonable evidence in the record. *See* Chancery Court Opinion at 17b-18b & n.2, App. 83, 100-01, 212-13. Evers's even more explicit statement in 1969 that "if we catch you going in those racist stores we're gonna break your damn neck" is undisputed.

b) Evidence of threats and violence outside the list acknowledged by Petitioners.

1) *Charles Evers's other threats.* The two promises to break the necks of uncooperative black citizens are not the only evidence to support the trial court finding that Evers promised violence on "at least" two occasions. In a tape-recorded speech in which petitioners say Evers "specifically

counsels Black persons against the use of violence in the strongest terms" (Brief for Petitioners at 32), Evers denounced violence against *whites* as counterproductive, but had the following messages for *blacks* who were considering breaking the boycott:

—"You go to any of the local black businessman and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause.)" App. 91.

—"[I]f you be disobedient now, you are going to be in trouble. Remember that, now listen. Listen good. They are going to start saying, 'You know what, Evers is down there with his goon squad . . . harassing poor ole niggers. . . . Well, good white folks you have been harassing us all our lives. . . . They are our children and we are going to discipline them the way we want to." App. 91-92.

—"None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. . . . Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause.)" App. 94-95.

In his speech Evers also indicated his intention to "chastise" blacks who had expressed opposition to him. App. 88. There is also testimony that Evers said, "We will have our boys out on the streets to take care of you if you go in the stores," and that "we would have them read out at our meeting at the church, and you will be taken care of." App. 63, 66. Throughout the boycott he repeatedly referred to the Black Hats as "my enforcers." App. 62. *See generally* App. 44, 86, 89, 111, 176-215.

2) *The Black Hats.* Charles Evers's admonitions against going to the police, his promises that people would

be "disciplined" and "taken care of," and his jocular reference to his "goon squad" must be viewed in context, as the state courts viewed them. These statements were made before, during and after a period in which numerous acts of violence were committed against boycott breakers. And Evers really did have a goon squad.

The Black Hats or Deacons were a group of about fifty young men who guarded the stores. They wore black hats or helmets and were encouraged to wear other black clothing. They carried weapons and used walkie-talkies in their surveillance of the stores. *See, e.g.*, App. 50-54, 79-81, 129-35, 150, 205-06, 289. They took the names of blacks who patronized the stores so that the names could be read at NAACP meetings and published in the Black Times, but the very presence of the Black Hats deterred many potential customers from entering the stores. *See, e.g.*, App. 69-71, 104, 187-88, 190-93. They engaged in close-order military drills, and were "a cause of pervasive fear among black citizens of Claiborne County, at least to the extent of preventing trade with white businesses." Chancery Court Opinion at 20b. The Black Hats sometimes blocked the entrances to stores or pulled people away by the arm as they were about to enter. App. 57, 63, 159, 372-73, 418. Many witnesses testified that it was widely believed in the community that the Black Hats would punish boycott breakers. *See, e.g.*, App. 158, 219-21, 225-27, 373. Members of the group were involved in many of the violent incidents that took place during the course of the boycott. James Bailey, a 200-pound convicted child molester who was a charter member, testified that people were afraid of the Black Hats. App. 154-61. He testified that "when I joined the NAACP I was kind of like a kid. If there was any fight in the neighborhood, I would jump into it, or I would break car glasses or something like that." App. 155. Marcus Jones, another Black Hat, testified that he thought people who were punished for breaking the boycott had "brought it upon themselves." App. 288. The trial court

concluded that the presence of the Black Hats at the stores was "most effective" in overcoming, "out of sheer fear," the volition of potential boycott breakers. Chancery Court Opinion at 39b; *see* Mississippi Supreme Court Opinion at 20a.

3) *Other acts of violence.* There was evidence in the record of other acts of physical violence than those mentioned by petitioners. William Holt, a young black man who was employed by one of the boycotted businesses, was beaten by Rudy Shields, leader of the Black Hats, because he was on the wrong side of the boycott. App. 55. A white-owned milk truck on which one white and one black employee were attempting to deliver milk to a black school was surrounded by a mob who threw rocks and punctured the tires of the truck. App. 121-22, 168-69, 355-69. Charles Davis, a black man who did not observe the boycott, testified that a brick was thrown through the window of his car, that subsequently the car was set on fire, and that still later the back window was shot out. R249-51. Emerson Davis testified that his windshield was broken and that a glue-like substance was put into his automobile engine so that the engine was ruined. App. 374. A white-owned store was burned under circumstances suggesting arson. App. 395-97, 402-06. There were several incidents besides the one mentioned by the trial court in which store-watchers, usually Black Hats, took packages away from black customers leaving white stores. *See, e.g.*, App. 67, 71, 72, 115, 117, 422, 424. "[V]iolence to those who broke the boycott continued to be a way of life in Port Gibson and Claiborne County." Brief of Mississippi Action for Progress in Mississippi Supreme Court at 21.

4) *Other threats of violence.* Against this violent background, threats of violence were most effective in enforcing the boycott. The trial judge mentioned an incident, not included in the petitioners' list of twelve, in which a black man named Ernest Darden was dissuaded from shopping in a white-owned store after a group of about

fifty people surrounded the car in which his wife and children were sitting. App. 44-48. The sheriff offered Darden his assistance but petitioner Calvin Williams (sounding what was apparently a popular theme among boycott leaders) told him that the sheriff "ain't gonna sleep with you." App. 83-84. Black citizens were told repeatedly that they would be "dealt with" or "taken care of," that their houses would be burned, that bricks would be thrown through their windows, that they would be "whipped" if they patronized the boycotted stores. *See, e.g.*, App. 76-77, 110-11, 121, 172, 219-21, 262-63, 297-99, 312, 335-37, 371, 374, 392, 397-401. Although most threats were directed to black persons, one white merchant was told that when he was down at the store that night his wife would be "visited" by the Black Hats. App. 58. Murriel Cullins was told that his mother would be tied up and left for the mosquitoes. App. 410-11.

5) *Fear of violence.* The state supreme court adopted the trial court finding that "[u]nquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse from the complainants." Mississippi Supreme Court Opinion at 20a. The petitioners suggest that this "fear" might mean "fear of vilification and traduction," since "the record establishes with remarkable clarity the general *absence* of fear in the community." Brief for Petitioners at 29, 31. Their evidence for this assertion is that many of the petitioners themselves testified that they had not heard of any violence. The courts below obviously disbelieved this testimony. Many witnesses, including some of the petitioners themselves, testified that there was a general opinion in the community that boycott breakers would be punished. *See, e.g.*, App. 157-58, 161, 172, 219-20, 221, 225-27, 231-34, 237, 259-60, 262-63, 278-80, 281, 287-88, 290-91, 299, 301, 303, 412, 425-26. Charles Evers, attempting to put some of his earlier statements in the best possible light, testified that

"I have said . . . that if somebody was to have no more sense in their head than to go in there, they might shoot at them. . . ." App. 184. Several ladies testified that they honored the boycott because they had heard of violence and were afraid of what might happen to them if they violated the boycott. App. 219-20, 239, 318, 413, 415. Sheriff McKay testified that he had over 100 complaints from black people who had been threatened with violence or who feared violence; most people, however, were too frightened to file formal complaints. App. 106, 123. Thus it is irrelevant that some of those who were threatened and attacked continued to patronize the boycotted merchants. This means that some people would not allow themselves to be bullied (or "disciplined" by those who regarded them as their "children"), not that there was an absence of fear in Port Gibson. As Susie Cox put it, "You get somebody to come shoot in your house and see how you feel." App. 320.

c) Evidence of manifestations of assent to coercive boycott tactics.

The courts below found that the violence and threats against boycott breakers were common knowledge in Port Gibson. Many of the petitioners themselves testified to this. *See, e.g.*, App. 157-61, 211-12, 219-21, 225-27, 262-63, 299. Moreover, the paramilitary "enforcers" who had been responsible for so much of this impermissible conduct remained on the streets, the vanguard of the boycott movement. Activists in the boycott movement participated in the weekly meetings at which names were read out and then heard about the ugly things that happened to those who had been named. They listened to Charles Evers and others utter "rhetorical" threats that often came true. At some point they had a responsibility to draw conclusions, to move to dissociate themselves from the threats and violence or perhaps even to try to stop them.

The courts below dismissed forty defendants against whom, after a thorough review of the record, those courts

were convinced the plaintiffs had not proved their case. The state supreme court found that the present petitioners "agreed" to "illegal force, violence and threats." The burden is on the petitioners to show that there is no evidence to support these conclusions. Their only attempt to do so is in three footnotes where they list certain things that certain petitioners did, usually without citation to the record, and allege that there is no other evidence that the named petitioners did anything wrong. Moreover, some of the categories used in petitioners' brief ("attended meetings," "engaged in picketing," "encouraged others to boycott") could embrace conduct indicative of participation in or ratification of illegal acts along with conduct that is innocent or constitutionally protected. Brief for Petitioners at 34-36, notes 37-39. Many of the assertions in these footnotes do not reflect all of the record evidence of the individual petitioners' connection with the illegal activities. For instance, 21 of the petitioners were members of the Black Hats, the "enforcers" of the boycott. *See* App. 56-58, 126-27; Chancery Court Opinion at 20b. Petitioners also fail to discuss the positions held within the NAACP organizational structure by W. E. Camphor (R5906), George Henry Walker (R12863, 13069), and Marjorie Brandon (R10882), among others, and dismiss as immaterial the fact that such positions were held by William Matt Ross and Marguerite Thompson. These and similar facts might have provided part of the basis for the state court determinations that these petitioners, unlike the defendants who were dismissed, were parties to the illegal agreement. The boycott was in form and substance an NAACP function. It was at NAACP meetings that the Black Hats were commissioned (*see* App. 129, 146-48), that the boycott breakers were denounced, that NAACP Field Secretary Evers promised to break people's necks. At least two black people were threatened for "breaking the law of the NAACP." App. 334, 392. Attendance at some meetings may have been more important than attendance at others, and participa-

tion in some functions more important than participation in others. The petitioners dismiss it all as irrelevant.

Respondents will, if the Court desires, present an exhaustive review of the record in order to show the precise acts from which the courts below might have concluded that each of the individual petitioners agreed to the violence. In view of the findings of the courts below, however, we do not believe that the bare "no evidence" allegation in petitioners' brief establishes such a burden on the part of the respondents.

IV. THIS COURT HAS NEVER HELD THAT SECONDARY BOYCOTTS ARE PROTECTED BY THE FIRST AMENDMENT, AND SHOULD NOT SO HOLD IN THIS CASE.

We have been principally concerned with defending the holding of the Mississippi Supreme Court: that threats and violence are not constitutionally protected activity and that when a boycott is enforced by threats and violence the state courts may assess damages against those boycott organizers who employed or condoned these tactics. For the purposes of the foregoing discussion we have assumed that if the boycott had been voluntary and nonviolent, the picketing and other activities associated with it would have been constitutionally protected. This assumption, however, is contrary to the jurisprudence of this Court, and this is not the case in which to reverse that jurisprudence.

In National Labor Relations Board v. Retail Store Employees Union, 447 U.S. 607 (1980), this Court reaffirmed the constitutionality of section 8(b)(4)(ii)(B) of the National Labor Relations Act, which prohibits members of labor unions from picketing a "neutral" party—a party with whom the union has no direct dispute—as a means of persuading that party to influence another party to settle a labor dispute. The facts of *Retail Store Employees* were similar to those in this case except in two respects: (1) in *Retail Store Employees* there was no evidence that

the strike activity was marred by violence or threats of violence; and (2) in *Retail Store Employees* the picketers asserting First Amendment claims were members of a labor union picketing for better wages and working conditions, whereas the petitioners in this case were picketing primarily for political reforms. In each case, however, the organizers of the picketing had made a strategic judgment that the most effective way to settle their dispute was to put pressure on a third party to use his influence with their principal adversary. In each case the picketed third party could be viewed as having substantial influence with the principal adversary. The Port Gibson merchants were influential with town officials; the picketed establishments in *Retail Store Employees* did over 90% of their business with the recalcitrant employer. 447 U.S. at 609. In each case the picketing asked purchasers not to transact any business whatever with the "neutral" party. The Court in *Retail Store Employees* held that even a ban on "peaceful picketing" did not violate the First Amendment so long as it banned only picketing "that predictably encourages consumers to boycott a secondary business." *Id.* at 616. The Court cited numerous precedents and added that secondary picketing "spreads labor discord by coercing a neutral party to join the fray." *Id.* But if picketing by its very nature is the sort of expression protected by the First Amendment, that peaceful picketing "spreads labor discord" should be irrelevant to its constitutionality.

Justice Stevens's concurring opinion provided the fullest elaboration of the reasons that a ban on secondary picketing might not violate the First Amendment. His opinion is discussed in section I(a), page 8 *supra*. Although the opinion speaks of "labor picketing," the reasons given are equally persuasive when applied to any picketing by an organized group seeking to exert pressure for compliance with demands. Picketing "is a mixture of conduct and communication" in which "the conduct element rather than the particular idea being expressed . . .

often provides the most persuasive deterrent to third parties about to enter a business establishment." The statutory ban only affected "that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea." 447 U.S. at 619. Picketing, in other words, is sometimes subject to regulation because it sometimes appeals to fear rather than to reason. If this is true for the purpose of evaluating the constitutionality of the federal labor laws, it should be just as true for the purpose of evaluating the constitutionality of the common law of civil conspiracy as applied by the state courts. Any distinctions between the labor context and other contexts should appear of record, and there should be no blanket rule against state prohibitions of peaceful picketing in nonlabor contexts.

a) The Constitution does not distinguish between acts committed in the course of pursuing "civil rights" and identical acts performed for other reasons.

Petitioners, however, suggest that as a matter of constitutional law a "civil rights boycott" must be treated differently from other boycotts. Indeed, they suggest that this Court has already held that "labor picketing" has been distinguished from "public protests concerning the desegregation of local schools" on the ground that the latter rest on a higher "rung of the hierarchy of First Amendment values." Brief for Petitioners at 45 n.48.

We urge that the proffered distinction does not accurately reflect the Court's holdings and is contrary to the letter and the spirit of the First and Fourteenth Amendments. The very constitutional provisions that provide for freedom of expression and equal protection of the laws should not be held to protect one individual who chooses to express himself in a certain way for a certain purpose, while leaving another individual open to civil and criminal penalties because he chooses to express himself in precisely the same way but to pursue a different goal. The Constitution does not respect status, and it does not notice whose ox is being gored.

> The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of a dispute in order to influence its outcome. . . . We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute.
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> Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 762-63 (1976).

It may be true, of course, that labor activity generally partakes of certain characteristics that take it outside the scope of the First Amendment, and that political activity generally does not partake of these characteristics. But to hold that one person seeking better wages and working conditions has fewer rights per se than another who happens to be seeking the appointment of a member of his race or faction to the Zoning Commission would be ironic and dangerous.

None of the cited cases stands for the proposition. Abood v. Detroit Board of Education, 431 U.S. 209 (1977), held that the worker's right to freedom of expression and association takes constitutional precedence over the union's right to contract. Carey v. Brown, 447 U.S. 455 (1980), held that the state could *not* discriminate *against* political picketing. It did not hold that the state could discriminate against labor picketing, much less that such a distinction is constitutionally required.

If the Court holds in this case that the picketing and other boycott activity was subject to absolute First Amendment protection, a contrary holding in a labor case with otherwise identical facts would rest on a distinction without a difference. *See* Brief Amicus Curiae of the AFL-CIO at 3-11 (suggesting First Amendment limitations on recovery against "membership groups," including both labor organizations and other political associations, for violence committed by some members of the group in

the course of group activities). Nor would the collateral consequences of a holding for petitioners be limited to labor cases. In light of this Court's holdings that expression is not less free because the speaker has an economic motive, *Virginia Pharmacy Board, supra,* such a decision would logically entail narrower constitutional limitations on unfair trade practices laws which prohibit modes of expression identical to those employed by petitioners here.

b) The facts of this case—violence, threats and mixed economic and political motives—make it an inappropriate vehicle for a holding that political boycotts are constitutionally protected.

If a constitutional distinction can be made between labor picketing and other picketing, it must be that labor picketing more frequently partakes of the threatening, constitutionally unprotected characteristics of communication mixed with conduct. Perhaps in a case in which violence and threats did not play a prominent role, the Court could find a basis for such a general distinction. This is not that case. Few labor cases will suggest as strongly as this case that at least some potential customers were frightened rather than convinced.

Moreover, the mixed political and economic motives in this case would lend themselves to extension of the holding into other contexts. The trial court found that some of the boycott leaders were major stockholders in a grocery and clothing store called "Our Mart," which as a result of the boycott "became an instant success." Chancery Court Opinion at 25b. The trial court also found that similar boycotted businesses lost sales and profits during the period of Our Mart's increase. *Id.* Nor is this the only economic aspect of the boycott. Even if Our Mart were found upon a review of the record to be an incidental effect of the boycott rather than a motivating cause, the original list of demands included demands that the merchants hire more black employees. Although to this extent the boycott could be characterized as primary rather than secondary and thus distinguished from the constitutionally unprotected activity in *Retail Store Employees,*

a holding in this case that picketing for the purpose of securing employment is pure First Amendment expression immune to state regulation would be difficult to distinguish from cases arising in other labor and economic contexts.

We do not believe that it is necessary for the Court to reach the question whether peaceful secondary picketing activity is constitutionally protected, since the Mississippi Supreme Court based its decision entirely on the enforcement of the boycott by threats and violence, and since the record provides abundant support for this holding. If the Court should find it necessary to reach this issue, we urge that the decision not rest on an absolute distinction between identical forms of expression directed toward different ends.

V. THE INJUNCTION GRANTED BY THE TRIAL COURT IS NOT PROPERLY AT ISSUE IN THIS PROCEEDING.

Although petitioners devoted approximately two-thirds of their petition for certiorari to attacking the injunction issued by the trial court, they devote only five pages of their brief to this question. We agree with this revised estimate of the importance of the injunction. The injunction is not at issue in this proceeding because it is moot, and because defendants waived the issue by pleading that it was moot and by not arguing the issue on appeal. More to the point, neither side in the litigation is concerned about the injunction, and both sides are very much concerned about the question of liability for damages.

Petitioners state in their brief that in the proceeding below "they used the word 'moot' only in their argument that, because the boycott was then inactive, there was no longer any basis for granting injunctive relief as a matter of state law." Brief for Petitioners at 11 n.8. *But see* Brief of Appellants NAACP et al. in the Mississippi Supreme Court at 35 n. 35: "The Mississippi attachment in chancery jurisdictional provisions have been ruled unconstitutional by both federal courts in this

State. [Citations omitted.] Since the action sounds in tort, and the injunctive aspects of the case are now moot, the case if remanded should properly be retried in circuit court as an action at law."

Petitioners argued the mootness of the injunction in an effort to defeat the jurisdiction of the chancery court. That this argument is no longer tactically advantageous does not affect the rule that a party is bound by his pleadings.

> The sworn allegations of a bill by which a litigant seeks to move a court to its relief may not be lightly disavowed by affiant when, in another proceeding, its recitals rise to plague him in an inconsistent course.

Standard Oil v. Crane, 23 So. 2d 297, 301 (Miss. 1945). *See also* Thomas v. Bailey, 375 So. 2d 1049 (Miss. 1979); Ivor B. Clark Co. v. Southern B. & I.D. Co., 399 F. Supp. 824 (S.D. Miss. 1974).

The petitioners also waived their right to argue that the injunction was improper on the merits by failing to argue this assignment of error in the Supreme Court of Mississippi. Under Mississippi law an assignment of error not argued in the brief is waived and will not be considered by the appellate court. Vail v. City of Jackson, 41 So. 2d 357 (Miss. 1949); Kennedy v. Little, 2 So. 2d 163 (Miss. 1941); B.L. Bruce & Co. v. Brogan, 166 So. 350 (Miss. 1936). The passing reference in a footnote to the mootness of the injunction will not suffice as an argument on the merits, since the petitioners had a duty to show by plausible argument with supporting authorities in what way the lower court erred, and upon their failure to do so the court was bound to conclude that there was no error. Wood v. Gulf States Capital Corp., 217 So. 2d 257 (Miss. 1968).

The trial court relied on Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1942), in issuing the injunction. We discuss *Meadowmoor* in part I(a), pages 8-9 *supra*. Petitioners argue that there was more violence in *Meadowmoor* than in this case; we are not prepared to concede that the respective quantities of vio-

lence in the two cases were of different orders of magnitude, and we see no constitutional distinction.

If, however, this Court finds that the injunction is not moot and that the issue has not been waived by petitioners, we have no objection to the modification of the injunction so long as petitioners are enjoined from acts of violence and from threats of physical violence against respondents and those who choose to do business with them.

CONCLUSION

For the reasons stated above, the resolutions of the disputed factual questions by the state courts should be respected by this Court, and the judgment awarding damages to the respondents for the injuries they suffered as a result of the tortious conduct of the petitioners should be affirmed.

Respectfully submitted,

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January 27, 1982